No. 11052.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SYDNEY M. WILLIAMS,

Appellant,

vs.

THE CONTINENTAL INSURANCE COMPANY OF NEW YORK, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

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Statement of Pleadings and Facts Disclosing Jurisdiction of District Court.

The Continental Insurance Company of New York, a New York corporation, filed an action in fraud for money against Sydney M. Williams and Elizabeth J. Williams in the District Court of the United States, Southern District of California, Central Division. It is alleged that the District Court had jurisdiction [Tr. p. 2, paragraph 3] because the controversy is of a civil nature wholly between citizens of different states, and that the amount in issue exceeds the jurisdictional minimum of $3000, exclusive of interest and costs.

On the basis of this allegation, the District Court had jurisdiction under the provisions of 28 U. S. C. A., section 41.

Jurisdiction of Circuit Court of Appeals.

This Honorable Court has jurisdiction to review the judgment rendered against Sydney M. Williams by said District Court under the provisions of 28 U. S. C. A., section 225.

Statement of the Case.

Plaintiff, hereinafter referred to for brevity as the insurer, filed an action against Sydney M. Williams and Elizabeth J. Williams in which it alleged that it issued to Sydney M. Williams two insurance policies, one in the sum of $4300 on jewelry specifically listed therein, and another covering unscheduled personal property, limiting the amounts to $250 on account of loss of jewelry, watches, and furs, and $50 on account of loss of money [Tr. pp. 3, 4]. Later, by agreement, two specified items were dropped from the $4300 policy, and Elizabeth J. Williams was added to both policies as an assured.

The complaint then states that defendants represented to the insurer that while this policy was in effect they had been held up on December 31, 1939, in Calexico and that there had been taken from them as a result of the holdup seven items of property specifically listed on page 5 of the transcript.

The complaint proceeds to aver that claim for the loss of said items was made, approved, and paid in the amount of $3950 on one policy and $300 on the other [Tr. p. 7]. It is then asserted that no robbery in fact occurred and that defendants' statements were false and fraudulent and

conceived as a "false and fraudulent scheme to deceive and defraud the plaintiff" [Tr. p. 9]. The alleged fraudulent claim is then averred to have resulted in damages to the insurer in the sum of $4250 plus interest [Tr. p. 10].

Sydney M. Williams filed a separate answer, in which he denied the allegations of a fraudulent claim and affirmatively averred that the robbery did in fact occur [Tr. pp. 10-11].

Defendant Elizabeth J. Williams filed a separate answer, admitting the allegations of a fraudulent claim between herself and Sydney M. Williams, but denying that she received any benefits from the transaction [Tr. p. 12].

The case was tried to the court without a jury, the court rendering judgment for the insurer as prayed [Tr. p. 24].

Defendant Sydney M. Williams thereafter made a motion for a new trial and also a motion to amend findings of fact and conclusions of law and motion to make findings of fact and conclusions of law more certain, which were supported by extensive affidavits [See Record, pp. 30-46 and 365-393], but the motions for a new trial, for amended findings, and for more definite and certain findings were denied [Tr. pp. 46-47].

Thereupon, within the time allowed by law, this appeal followed.

Specification of Errors.

Appellant hereby makes the following specifications of error:

1. That the evidence is insufficient to sustain the findings of fact, conclusions of law and judgment.

2. That the judgment is excessive in that it appears from the evidence that appellee had possession of certain articles of jewelry alleged to have been set forth in appellant's proof of loss; whereas said judgment now includes the value of said articles in possession of the appellee without giving credit therefor to appellant.

3. That the trial court erred as follows:

(a) in denying appellant's motion for a new trial;

(b) in denying appellant's motion to amend findings of fact and conclusions of law and directs the entry of a new judgment;

(c) in denying appellant's motion to correct the findings and to make the same more definite and certain.

ARGUMENT.

I.

The Complaint, the Findings of Fact and Conclusions of Law, and the Evidence, Being Predicated on a Scheme or Conspiracy, the Judgment Could Not Be Based on the Uncorroborated Admissions of One of the Alleged Conspirators.

(a) The Case Was Pleaded and Tried on the Theory of a Conspiracy.

The vital question in this case is, Did a holdup actually occur?

If it did, the judgment of the court is obviously erroneous; if it did not, a judgment for the plaintiff was in order, although, as we shall show in point II, the particular judgment rendered in this case would be improper and excessive even then.

The complaint alleges certain acts of the defendants, such as the taking out of the policies, the listing therein of certain property owned by the defendants, the reporting of a holdup in Calexico, the subsequent filing of a verified claim based on the alleged holdup, and the subsequent payment of the claim by the insurance company, believing that the holdup had occurred. It is further claimed that said alleged holdup was reported entirely by design and procurement on defendants' part for the purpose of defrauding plaintiff [Tr. p. 9]. On the same page of the record we read as a further allegation that each and all of the representations made by the defendants "were part of a false and fraudulent scheme to deceive and defraud the plaintiff."

The identical language is used in the findings of fact [Tr. p. 21]. There can be no doubt that the entire

complaint, although the precise term "conspiracy" is not used, was conceived and the case was tried on the theory that a conspiracy to defraud had been committed. Two people, to wit, the defendant Sydney M. Williams and his then wife Elizabeth J. Williams, are supposed to have concocted a scheme by which they would fake the holdup by procurement and design in order to obtain money not rightfully belonging to them from the insurance company.

If further proof is needed that the case was conceived to be one of conspiracy and that it was so tried, we need to refer only to the record on new trial [Tr. pp. 385-393], where the requirements concerning the sufficiency of the evidence were discussed and where it plainly appeared that everybody proceeded on the theory that this case involved a conspiracy and that the evidence should be required to measure up to the rules pertaining to civil conspiracies.

(b) Summary of the Evidence.

This being the case, a detailed examination of the evidence is required. The coconspirators are said to have been the appellant Sydney M. Williams and Elizabeth J. Williams, husband and wife. The parties became estranged shortly after some of the alleged fraudulent acts and later divorced each other. While husband and wife, driving home one evening in Los Angeles, the husband is supposed to have said to his then wife, "This would be a beautiful spot for a holdup." No one else was present. On December 31, 1939, the two went to Calexico. She claims she did not take any jewelry except some cheap costume jewelry which she claims she previously bought on Hollywood Boulevard at the instigation of her husband [Tr. pp. 76, 84]. According to her Mr. Williams wore only a wristwatch, but none of the items labeled 1, 2, 3,

4, 5, or 6 in the proof of loss [Tr. p. 5] was taken along, and the wristwatch which Mr. Williams was supposed to have worn on the day in question was later, so the witness claims, thrown into the All-American Canal during a trip to Yuma. No one else was present during any of these occurrences. Before the couple left for Calexico, so the conspirator claims, he told her he had planned on having the holdup on the way to Mr. and Mrs. Brown's house. He is supposed to have said that "We were going to go down there and collect the money on the diamonds and going to have a fake holdup" [Tr. p. 83]. According to her no holdup occurred, but on the way to the Browns they discussed how they would rush up to their house, and they then did rush up to the Browns and claimed they had been robbed [Tr. p. 81]. She claims the jewelry which was listed as having been stolen in the proof of loss was hidden in the house of the parties. Mr. Williams is supposed to have taken two 2x4's, chiseled a cavity into each of them, put the jewelry into the cavities, nailed the 2x4's together, then she claims he hid them in the plaster in an unfinished room of their common residence [Tr. p. 85].

The couple separated on the 8th day of May, 1940, and shortly thereafter Sydney M. Williams is reported to have gone to the house and announced to his estranged wife that they were going to have the diamonds broken up. He is then said to have taken the jewelry from its hiding place, where it had remained undisturbed all that time [Tr. p. 100]. Not knowing anyone who was able to break up the jewelry [Tr. p. 101], it is claimed he asked his estranged wife for assistance. She apparently knew a Mr. Leitch, a dental laboratory technician in San Diego, who might be able to do it [Tr. p. 101].

Then follows the equally fantastic trip to San Diego, which this estranged couple is supposed to have taken and during which the husband, Sydney M. Williams, is supposed to have remained downstairs in a car on University Avenue during a full afternoon [Tr. p. 103] while his estranged wife went to the dental laboratory technician to have the jewelry broken up. Items 1 and 3 of the list on page 7 of the transcript were not broken up, although Elizabeth J. Williams had them with her at the time in Mr. Leitch's laboratory [Tr. pp. 103-105]. On this breaking-up trip, Mr. Williams did not go into the laboratory of the dental technician, but it is claimed by her that she took Mr. Leitch to the waiting automobile and there introduced Mr. Leitch to Mr. Williams.

The foregoing is, in its essential outlines, the story as told by Mrs. Williams. The details are omitted in the interest of brevity. Her own recital of some of the events was self-contradictory, and therefore particular parts of the transcript show different and additional details. For the purpose of this appeal, however, it is sufficient to remember that she claims the holdup to have been planned in advance; that according to her none of the jewelry was actually lost; and that several months after the alleged holdup occurred and several months after the claim for the loss had been paid, and after she and her husband had separated, the jewelry was broken up in San Diego.

We do not deem it necessary to tell Sydney M. Williams' version in detail. It was in every essential, as well as in every particular, directly opposed to the version of his alleged conspirator. Only the fact that a trip was taken to Calexico and that in the course thereof they called on the Browns and reported the holdup was admitted. His claim is that the holdup was not faked and that it

actually occurred. He denies having thrown his wristwatch into the All-American Canal; he denies the episode of the 2x4's; he denies ever having taken a trip to Mr. Leitch's laboratory in San Diego, or having met him there at all.

When we stop and consider the evidence so far, it appears that there is no independent proof whatever of any conspiracy; that is, no independent proof whatever of the fact that the holdup was prearranged and was faked, or that the jewelry was not lost as alleged.

In an effort to overcome this obvious difficulty in plaintiff's proof, there were called by plaintiff on his case in chief the following witnesses: Arthur Stanley Leitch, Lolita Leitch Jones, and Hugh James Jones; and subsequently by way of ostensible rebuttal, but in fact as further witnesses in chief, Louise Berrenberg, Irma Cudd, and Charles Griffin. None of these people, except Mr. Leitch who did the cutting up of the jewelry, claimed they saw Mr. Williams, but apparently Mr. Leitch's laboratory was quite a chummy place, because most of the rest of them happened to be there on the day in question for social purposes. They all had an opportunity, without being able to describe the jewelry in detail, to admire it and to testify to the effect that it had been brought there for the purpose of being broken up. Apparently nobody thought much of so unusual an incident in a dental laboratory, or, if they had "their suspicions," wisely kept silent about it, and hardly anybody expressed amazement that the laboratory technician was asked to cut up this valuable jewelry. The explanation which Elizabeth J. Williams gave one of the parties, namely, that they needed money, could only increase, but not allay, the "suspicions" of those present.

Inasmuch as plaintiff's counsel relied on this affair in San Diego as corroboration of Elizabeth J. Williams' story as an accomplice, it is important to keep in mind that this affair is claimed to have happened sometime in June, 1940, long after the alleged conspiracy had found its consummation by the payment of the various checks in settlement of the claim of loss on March 9, 1940. Therefore, even if it were believed, it would not be sufficient as corroboration; *first,* for the reason that it occurred several months after the alleged consummation of the conspiracy, and, *second,* it does not constitute independent corroboration of the conspiracy itself. Only Mr. Leitch claims to have seen Mr. Williams on the date in question, and Mr. Williams denies having been in San Diego on the purported trip. It is important that his bit of testimony be scrutinized carefully. In order to facilitate such a scrutiny, we are setting it out here in full:

> "A. She left at that time, and I went downstairs with her to the car, where Mr. Williams was, and spoke to him for a moment, and they went on their way.
>
> Q. What was said by Mr. Williams to you at that time, and by you to him? What conversation did you have? A. I don't believe there was a lot of conversation. I remember we shook hands through the car, and he made some mention of my doing it; I believe he thanked me for doing it.
>
> Q. Then you went back? A. I went back to the office.
>
> Q. And they went on in the car? A. Yes, sir." [Tr. p. 118.]

> "Q. When you came down to the car, there was no one on the outside of the car, was there? A. No.

Q. Whoever was there was on the inside of the car? A. That is right.

Q. And it was dark when you came down, wasn't it? A. It wasn't so dark that I couldn't detect who I was talking to.

Q. Was it dusk? A. Just about dusk.

Q. Was this a coupe or a sedan? A. I thought it was a sedan.

Q. What kind of a sedan was it? A. Knowing cars, I know it was a Dodge.

Q. A Dodge sedan? [81] A. Yes.

Q. Light or dark color? A. I don't recall the color. It seems to me it was probably maroon.

Q. A maroon sedan? A. Yes.

Q. A maroon Dodge sedan? A. Yes. It may have been a coupe. I thought it was a sedan.

Q. Didn't Mrs. Williams come down to the car and say, 'I want you to say hello to Mr. Williams,' or something to that effect? A. I knew I was going down to meet him.

Q. You had been up with Mrs. Williams in the laboratory for how many hours? A. A couple or three hours, probably more than that.

Q. More than three hours? A. It may have been. I didn't work on it continually. I had other business to take care of. I didn't work on it continually.

Q. Could the person in that car have been someone else other than Mr. Williams? A. I don't think so.

Q. Could you be mistaken about the person you saw in that sedan? A. Anybody could be mistaken, but I am quite positive [82] it was Mr. Williams." [Tr., pp. 124-125.]

It is thus seen that every single act in the alleged conspiracy was related only as having occurred strictly between Mr. and Mrs. Williams, and that, outside of her uncorroborated story, *no essential act of the conspiracy, nor the conspiracy itself, was established, testified to, or corroborated by a single witness.*

It remains, therefore, merely to mention the authorities which hold that in such a state of the record the finding of a conspiracy is unsupported by the evidence.

(c) The Uncorroborated Story of a Co-conspirator Is Insufficient to Support a Judgment Against the Co-conspirator.

The rule that there must be independent proof of a conspiracy before the admissions of a conspirator is admissible against the other was expressed in the early case of *Estate of James,* 124 Cal. 653 at 659, where the court said:

> "It is also claimed that these witnesses were co-conspirators with the appellant Laura, and that as such conspirators their declarations were admissible. There is not sufficient evidence in the record of a conspiracy between these parties to justify the admission of the evidence upon that ground. As to the declarations of Laura, the appellant, they were admissible against her at least."

The same rule is still more forcibly expressed in *Taylor v. Bernheim,* 58 Cal. App. 404 at 409, where the court said:

> "Appellant complains of the ruling of the trial court striking out, as hearsay, on motion of plaintiff, certain declarations claimed to have been made by

Taylor, Jr., to one Samuels out of the presence of plaintiff, concerning the trading of an automobile belonging to Taylor, Jr., for the car in question.

"We are satisfied that the ruling of the trial court was correct. The declarations were not admissible under the theory that a fraudulent conspiracy existed between the two Taylors, as contended by appellant, for the reason that before declarations of one conspirator may be competent evidence against his confederate, there must be independent proof tending to establish the conspiracy, and such conspiracy itself cannot be proved as to either of the alleged co-conspirators by the evidence of the declarations of the other. (*Barkley v. Copeland,* 86 Cal. App. 483 [25 Pac. 1, 405].) There was no such independent proof here."

In the leading case of *Del Campo v. Camarillo,* 154 Cal. 647 at 653, we read:

"Many authorities are cited by the respective counsel in regard to the rule concerning the admissibility and effect of such declarations. There is no serious disagreement on the subject. The rule is that such declarations of one conspirator, made while the conspiracy is pending and during the progress of the plan adopted for its accomplishment, are admissible against both. But, if made after the act designed is fully accomplished and after the object of the conspiracy has been either attained or finally defeated, the declaration will be admissible only against the person who made it. Nor are such declarations admissible against a co-conspirator to prove the formation of the conspiracy.

"The plaintiffs contend that in the present case, at the time this declaration was made by Juan E. Camarillo in March, 1905, the object and purpose of the conspiracy had not been accomplished, and hence that the declaration was evidence against Adolfo. Their theory is that the purpose of the conspiracy was to obtain the interest of their mother in the property and to keep possession thereof as long as they lived, and that at any time during the life of the two conspirators, while they remained in possession and ownership of the property, the declaration of either as to the conspiracy would be admissible against the other. In our opinion this theory is absolutely untenable. The object of the conspiracy if there was any, was to obtain from the mother her interest in the rancho. That object was fully accomplished when they secured the execution of a deed from her to them conveying to them her interest. The deed, being executed, immediately vested in them whatever interest the mother had. Nothing further remained to be done in furtherance of the conspiracy, or to effect the object for which it was formed."

Under the federal rules, the admissibility and weight of the evidence are governed (a) by the statutes of the United States, (b) by the rules of evidence heretofore applied in the United States courts, and (c) by the rules of evidence applied to the courts of general jurisdiction of the state in which the United States court is held.

Rule 43A, Fed. Rules Civ. Proc.

As already stated, it is the rule in California, as well as in the federal courts, that proof of a conspiracy cannot rest solely and exclusively upon the testimony of a co-conspirator at the trial. Admissions of co-conspirators are admissible, but it is not their own testimony which can establish the conspiracy, and even their admissions against interest, confessing the conspiracy made to third parties, are not sufficient until and unless there is proof independent thereof that the conspiracy existed. Now, it is true that the court has the power to regulate the order of proof and may admit in evidence an admission of conspiracy before the conspiracy itself is established by independent evidence; but it remains true, nevertheless, that unless the fact of the conspiracy is later established by independent evidence, *the admission standing alone in and of itself is insufficient proof and will not support a judgment against the other party to the alleged conspiracy.*

Section 1870, subdivision 6 of the Code of Civil Procedure, provides:

> "In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: . . . (6) *After proof of a conspiracy,* the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy."

In 11 *Am. Jur.,* under the heading "Conspiracy," paragraph 56, it is stated that the rules of evidence applicable to criminal prosecutions for conspiracy are ef-

fective in civil cases for conspiracy. The text expressly refers to paragraph 43 of the same article, in which some of the requirements in criminal cases are discussed, and there we read:

> "Corroboration of Accomplice's Testimony. — A conspirator may be a witness in the prosecution of members of the conspiracy in which he participated, and his testimony is admissible as to all matters material and relevant to the issue. However, pursuant to the rule concerning accomplices generally, a conspirator cannot be convicted upon the testimony of his accomplice or accomplices unless such testimony is corroborated by other evidence tending to connect the accused with commission of the offense. Proof that the offense was committed and of the circumstances thereof is not enough."

In the case at bar, we have absolutely nothing more than the testimony of the accomplice or co-conspirator. We do not even have admissions of Mrs. Williams to third persons to the effect that the holdup was supposed to be faked. On the contrary, we have Mrs. Williams admitting the holdup under cross examination:

> "Q. By Mr. Penney: Mrs. Williams, when were you married to Mr. Williams? A. June 3, 1939.
>
> Q. And a divorce action was brought against you by Mr. Williams in 1940, was it not? A. Yes, sir.
>
> Q. And you testified under oath in the Superior Court of the County of Los Angeles in that case, did you not? A. Yes, sir.

Q. And did you not at that time, while under oath, state, in substance or effect, that there was a robbery which occurred in Calexico on the 31st day of December, 1939, in which certain diamonds were taken from you and from Mr. Williams? A. I said there was, and I —" [Tr. p. 144.]

"Q. By Mr. Davis: Let me ask you this question: Isn't it a fact, Mrs. Williams, that the question of whether or not there had been a bona fide robbery in Calexico in 1939, in December, 1939, was never asked or gone into in the divorce proceeding? . . . A. No, it wasn't gone into.

Q. By Mr. Davis: And you did not testify in the divorce proceeding that there had been a bona fide robbery in Calexico in 1939? A. I don't remember. I think I did.

Q. You did what? A. I said there was a robbery. I don't remember exactly. I know it wasn't the main issue. I could be wrong." [Tr. pp. 145 and 146.]

In addition thereto, there was testimony that Elizabeth J. Williams stated to Barbara Lewbel that the holdup had occurred, the exact testimony being as follows:

"Q. By Mr. Penney: Mrs. Lewbel, you know Sydney Williams and Mrs. Williams? A. Yes, sir.

Q. Did you have occasion to see them on the first day of January, 1940? A. I did.

Q. Where did you see them at that time? A. At my home.

Q. Did you have any conversation with Mrs. Williams in regard to a hold-up in Calexico the day before? A. I did.

Q. Did she tell you, in substance or effect, that there had been a hold-up in Calexico, in which their diamonds and jewelry had been taken? A. She did.

Q. Did you have a conversation with her in regard to a mink coat she was wearing? A. Yes, I did.

Q. Did you tell her, in substance or effect, that it was a fine thing they hadn't taken the coat, and did she tell you, in substance or effect, that the coat would have been hard to dispose of after the hold-up and that was the reason they didn't take it? A. That is just what she told me." [Tr. pp. 248-249.]

Aside from the contradictory testimony of Elizabeth J. Williams what evidence is there to show a conspiracy to defraud? She says the holdup was faked; but she said that only during the trial. No witness testified that she made an admission during the pendency of the conspiracy or in its preparatory stages that the claimed events were faked. Her admissions at that time were the opposite. We do not believe that it is necessary to further labor this point. Under the rules applying to conspiracies, the testimony of the co-conspirator was not enough to connect Sydney M. Williams with the fraud. It was necessary that there should have been other evidence tending to connect him with the alleged wrongful acts. Such other evidence was, however, lacking.

II.

If Exhibits 7 and 8 Were in Fact Items 1 and 2 of the List Appearing on Page 17 of the Record, Then the Judgment Is Erroneous Inasmuch as It Compensates the Plaintiff for Having Paid for Those Articles in Spite of the Fact That Plaintiff Had Retrieved Them. If, However, Exhibits 7 and 8 Are Not Items 1 and 2 of Said List, Then There Is No Proof That Those Articles Were Not Lost and the Entire Story of Elizabeth J. Williams Is Then Hopelessly Discredited.

It will be remembered that during the trial there was introduced Exhibit 7, which, according to the testimony, purported to be identical with Item 1 referred to on page 16 of the transcript, and Item 1 referred to on page 17 of the transcript. The same applies to Exhibit 8, referred to as Item 3 on the list on page 16 and Item 2 on page 18 of the transcript. Items 1 on page 16 and page 17 agree in description, and Item 3 on page 16 and Item 2 on page 18 likewise agree. *But neither Exhibit 7 nor Exhibit 8 agree with the description of any item in the complaint.*

It was claimed in the course of the trial by Elizabeth J. Williams, that these two Exhibits 7 and 8 were not broken up during her trip to San Diego; that she retained and saved them intact from the mass of jewelry in question, and that subsequently she turned them over to the plaintiff insurance company, which had them in its possession during the trial and introduced them in evidence.

Now, it is obvious on inspection that Exhibit 7, which is to correspond with Item 1 on page 16 and Item 1 on page 17, is not a platinum and diamond watch with diamond bracelet attachment, containing 84 diamonds and

two baguettes, in that a count will reveal that Exhibit 7 contains only 64 diamonds. Obviously, Exhibit 7 is not Item 1 on pages 16 and 17 and, in order to conclusively demonstrate that fact, we have requested that that particular exhibit be submitted to the court.

Turning now to Item 3 on page 16 and 2 on page 18 of the Transcript, this is supposed to be a diamond friendship ring with 14 smaller round stones set in platinum. This was supposed to be Exhibit 8; but again a comparison of this exhibit with the description shows the exhibit to be different from that description in that the exhibit has only 12 stones rather than 14.

This discrepancy suggests one of two things: If the court was correct in disregarding it and finding that the items constitute two of the items involved in the alleged holdup and later saved, then it must have been obvious to the court that they had been retrieved and were in the possession of the insurance company at the time of the trial and that they could have not have their cake and eat it at the same time. In other words, since they had the articles, they could not be compensated for the money allegedly paid upon the representations that they were lost, and the judgment should have been reduced by $650.

We, however, contend for the following result. Based on the inescapable fact that Exhibits 7 and 8 do not correspond with Items 1 and 3 on page 16 and Items 1 and 2 on pages 17 and 18 respectively, there can be only one conclusion; namely, *that the whole story of* Elizabeth J. Williams is fabricated and untrue in accordance with her

vindictive boast to one of the witnesses [Tr. pp. 250-251] that she was doing it to harass Mr. Williams. That being so, she did not save out of the alleged cutting up the items described on pages 16 and 17 of the Record, *but some other articles* which she delivered to the insurance company. The items in evidence were not the ones described in the schedules but sufficiently similar so as to escape a superficial examination.

This discrepancy between the exhibits and the schedules was not fully called to the court's attention until the motion for a new trial was made, and at that time an affidavit was presented, signed by Emanuel M. Lippett found on page 37 of the record, which reads as follows:

> "Emanuel M. Lippett, being first duly sworn, on his oath deposes and says:
>
> That he has examined the lady's wrist watch and the lady's ring, both of which articles were introduced in evidence in the above-entitled action. That neither the watch nor the ring is an article which your affiant appraised for insurance by the Continental Insurance Company at the time said company placed insurance on the jewelry of said Sydney M. Williams."

It is clear, we submit, that if the judgment is to be sustained, a proper deduction for the items in question must be made from the judgment. But rather, we submit that the incident shows, like so many other contradictions in the record, that the testimony of Elizabeth J. Williams is so devoid of credibility that it should be disregarded as a matter of law.

III.

The Court Abused Its Discretion in Not Granting Defendant Sydney M. Williams' Motion for a New Trial.

In the case at bar, the trial court should have granted the motion for a new trial. The evidence was obviously insufficient to sustain the findings for the simple reason that the declarations of the co-conspirator were uncorroborated and therefore did not measure up to the legal standard required to support the judgment. A new trial should also have been granted because the judgment as it stood, even if our argument concerning co-conspirators were invalid, was too high by the sum of $650, and a corresponding credit should have been given.

Under this state of the record, it was necessary to grant a new trial. It is necessary to grant a new trial whenever the judgment is contrary to the evidence. In passing on the question of whether the judgment is contrary to the evidence, the court is not restricted to instances where on motion it should have dismissed a verdict, but in addition the court is entitled to and should use "a certain indefinable range of discretion in the interest of judgment. The court may weigh the evidence, which it cannot do on motion for a directed verdict."

> *Cyclopedia of Federal Procedure,* 2nd Ed., Vol. 8, p. 125.

Apart from these compelling reasons why a new trial should have been granted, there are other considerations which impel us to submit that the denial of a new trial under the circumstances was an abuse of discretion.

Under the rules of civil procedure, a new trial may be granted where the case has been tried without a jury

> "for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States." (Rule 59(a).)

A. Newly-discovered evidence was a ground heretofore available on motions for new trials in the United States courts of equity.

> *Cyclopedia of Federal Procedure*, 2nd Ed., Vol. 8, p. 118.

B. The newly-discovered evidence referred to in the various affidavits on file herein fulfill all the conditions, under which evidence will be held to be newly discovered.

The affidavits submitted in support of the application for new trial are those of George Penney [Tr. pp. 30-34]; Rosalind Goodrich Bates [Tr. pp. 34-35], David Riskin [Tr. p. 36], Emanuel M. Lippett [Tr. p. 37], and Irving H. Lakin [Tr. pp. 37-38]. These affidavits fall into three classes: The affidavits of George Penney recites in detail efforts made on his part to obtain a deposition of the defendant Elizabeth J. Williams, who was out of town. This affidavit was not filed to discredit opposing counsel but merely to show the diligence exercised on the part of the attorney for Sydney M. Williams to ascertain the full and complete story of Elizabeth J. Williams. Above all, the affidavit recites in detail that it came to Mr. Penney's knowledge for the first time when he did take the deposition of Elizabeth J. Williams one day before the trial that she had consulted certain attorneys, to-wit. S. W. Thompson and Herbert Ganahl, and that he had informed these people of the story told by Mrs. Williams and that, when

asked whether she had previously related the same story to them, those gentlemen refused to give details concerning the disclosures made by Elizabeth J. Williams on those occasions, but declared their willingness to appear in court and testify, provided the court would find that the disclosure made to them were not privileged. They further assured George Pinney that the testimony which would then be given by them was of such a nature as to assist materially in a proper determination of the issues of this case.

The affidavit of Rosalind Goodrich Bates, commissioner in the domestic relations court in the year 1940, before whom a hearing was held in October 1940 (after the San Diego episode) sets forth that during that hearing Elizabeth J. Williams made no claim for any unmounted diamonds; she was not requested to return a two- or three-carat unmounted diamond to Sydney M. Williams; and that the only pieces of jewelry discussed during said hearing were a man's diamond ring and an Elk's pin. All this is in flat contradiction to the story of Elizabeth J. Williams.

The affidavits of David Riskin and Irving H. Lakin corroborate in detail the estimates of value given by Sydney M. Williams and therefore lend additional substance to his testimony.

Without analyzing these affidavits in further detail, we refer particularly to Mr. Penney's affidavit on page 33 of the Transcript. It cannot be gainsaid that had the two attorneys mentioned in Mr. Penney's affidavit been called they would have given testimony contradictory to the story of Elizabeth J. Williams on the stand. They were no longer bound by the privilege, because it had been waived by the acts of Elizabeth J. Williams on the stand.

(The authorities pertaining to this point are given in the footnote.)*

Nevertheless, their hesitancy in making a disclosure of the details in the circumstances is understandable, but it is also plain that they would have discouraged Mr. Penney from pursuing the matter if the story told by Elizabeth J.

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*A. The attorney-client privilege does not exist in the following situations:

1. It is not for the attorney but for the client to assert the claim of privileged communication, and if the client has waived the privilege, the attorney cannot claim it.

Hunt v. Blackburn, 128 U. S. 464, 32 Law. Ed. 488, 9 Sup. Ct. 125;

Knaust Bros. Inc. v. Goldschlag, 34 F. Supp. 87;

In re Fisher, 51 F. (2d) 424.

2. The attorney may be interrogated preliminarily concerning the circumstances of his employment in order to enable the trial judge to determine, as a matter of fact, whether the privilege exists.

Chirac v. Reinicker, 11 Wheat. (24 U. S.) 280, 6 Law. Ed. 474.

3. If the privilege is claimed on the ground that to waive it would reveal incriminating testimony, this claim is valid only if the divulging of the alleged confidential communication would lead to a federal prosecution. The fact that the state may prosecute on the basis of the divulged information, or the fact that civil liability may be predicated upon it, does not prevent the disclosure or entitle the client to insist on the communication to his lawyer being kept secret.

United States v. Murdock, 284 U. S. 141, 76 Law. Ed. 210, 52 Sup. Ct. 63, 82 A. L. R. 1376.

4. Under the facts of the previous subparagraph, the privilege cannot be claimed where the disclosure cannot result in prosecution on account of anything about which the witness may testify; as, for instance, where the offense which his testimony would disclose is barred by the statute of limitations. In this case, the alleged acts of conspiracy to defraud occurred in the year 1939. The statute of limitations for felonies in the State of California, other than those specifically enumerated in section 800 of the Penal Code, is three years. Hence, criminal prosecution could not result to the

Williams to them had been in substantial accord with that given by her on the witness stand.

The affidavits further disclose, epsecially that of Emanuel M. Lippett, that the exhibits on which so much reliance was placed as being two of the insured articles

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defendant Elizabeth J. Williams, and she can no longer claim that her communications to her attorneys are privileged.

Hale v. Henkel, 201 U. S. 43, 50 Law. Ed. 652, 26 Sup. Ct. 370;

Brown v. Walker, 161 U. S. 591, 40 Law. Ed. 819, 16 Sup. Ct. 644;

Moore v. Backus, 76 Fed. (2d) 571, 101 A. L. R. 379.

B. The attorney-client privilege may be waived by the client under the following circumstances:

1. Where the disclosure to the attorney is made in the presence of other persons.

Hartzell v. United States, 72 Fed. (2d) 569;

York v. United States, 224 Fed. 88.

2. The privilege is waived where the client herself testifies to a portion of the transaction. This automatically opens the door not only for the balance of the transaction but also for the testimony of the attorney to whom the balance of the transaction was privately disclosed.

Cyclopedia of Federal Procedure, 2nd Ed., Vol. 7, p. 71.

"The privilege, as a personal one, may be waived. By offering to testify, a defendant waives his claim that his privilege against self-incrimination has been invaded. Ordinarily the privilege is waived if answer is made without claiming it, and if the witness testifies in part to incriminating facts he cannot resist being compelled to make a full disclosure."

Cyclopedia of Federal Procedure, 2nd Ed., Vol. 7, p. 77.

"Another method of waiving privilege is for the person entitled to claim it himself to testify voluntarily concerning the subject matter or himself call for or introduce the testimony or document. This rule has frequently been applied to the testimony of clients or patients concerning communications between them and their counsel or physicians, the door being thus opened to the testimony of the latter."

See also the numerous cases cited, especially

Knaust Bros. Inc. v. Goldschlag, supra; and

Steen v. First Natl. Bank of Sarcoxie, 298 Fed. 36,

in which it was held that the rule of waiver applies even though the witness was subpoenaed, and even though the witness's testimony was given on cross-examination.

alleged to have been lost in the holdup were not in fact the articles in question and did not conform to the description in the policy and were definitely not the articles appraised by the affiant for the purpose of insurance.

If we add to the foregoing situation the confusion of this particular record, the genuine surprise under which the trial attorney found himself, the impossibility of his ascertaining beforehand that Elizabeth J. Williams had consulted other attorneys, the extraordinary subject matter of the controversy, but, above all, if we consider that there was here involved the reputation and entire future of an attorney at law, it is hardly understandable how the trial judge could justify the denial of the motion for a new trial. In fact, we urge that in the light of the extreme delicacy of the questions involved, the tenuousness of the evidence, and the situation of the parties, it amounts to an abuse of discretion for the trial court to have refused the defendant Sydney M. Williams' motion for a new trial.

Conclusion.

In conclusion it is respectfully submitted:

1. That the only evidence of a conspiracy or of any of the overt acts leading up to the conspiracy and committed in the course of it rested exclusively in the confused, contradictory and discredited testimony of a co-conspirator. Not one single act, either of planning the holdup or of the holdup itself, or of any of the acts testified to by the vindictive ex-wife, were corroborated, and therefore the judgment as it stands is contrary to the evidence.

2. That if the evidence, by the utmost exercise of imagination, could be held to reveal a conspiracy, the

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No. 11052.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SYDNEY M. WILLIAMS,

Appellant,

vs.

THE CONTINENTAL INSURANCE COMPANY OF NEW YORK, a corporation,

Appellee.

APPELLEE'S ANSWER BRIEF.

Appellee's Statement of the Case.

Since no errors are assigned on rulings of law in the course of the trial or in the reception or rejection of evidence, and the whole tenor of appellant's brief is an invitation to this Appellate Court to review the entire evidence of a trial lasting several days, with many witnesses, to pass on disputed questions of fact, resolve conflicting inferences, and to test the credibility of witnesses; and since appellant has not even tried to make a fair and impartial statement of the facts adduced or to summarize all the evidence upon which the District Court based its findings, we believe that a proper consideration of this appeal can be had only by a complete statement of the case and thereafter by a discussion of appellant's specifications of error.

The evidence and the admissions in the pleadings show that prior to the 31st day of December, 1939, appellee, an insurance company, had insured appellant Sidney M. Williams and his wife, Elizabeth Williams, against loss by robbery (among other perils) of certain jewelry, which jewelry was as is specifically described in the complaint. [Tr. p. 17, fol. 22.]

That the jewels insured were all the jewels owned by either or both of the defendants, with the exception of a diamond Elk's pin, a small diamond ring owned by appellant, and a jeweled cigarette case owned by defendant, Elizabeth Williams. [Tr. p. 75, fol. 26.]

That sometime prior to December 31, 1939, appellant had been playing the stock market and was in need of funds, and had on several times broached the subject to his co-defendant, Elizabeth Williams, of cashing in on their insurance policies by a fraudulent claim of loss. [Tr. pp. 81, 82, fols. 34-35; p. 83, fol. 36.]

That shortly before December 31, 1939, in preparation for carrying out of this scheme, appellant procured two pieces of board (2x4s) from an unfinished attic room in defendants' home in Los Angeles, hollowed out a receptacle in these boards, wrapped and placed all the jewels, with the exception of the above-mentioned uninsured jewels and appellant's wristwatch and defendant Elizabeth Williams' wedding ring, in the receptacle, covered them with plaster of paris, and nailed the two boards together and secreted them in the unfinished room. [Tr. p. 84, fol. 39.]

Shortly prior to December 31, 1939, appellant and his co-defendant went to a Chinese store on Hollywood Boulevard in Los Angeles and there purchased a large

imitation diamond ring for $1.95 or $2.95 which was an imitation of defendant Elizabeth Williams' engagement ring, insured as Item No. 5. [P. Ex. 1.] [Tr. p. 76, fol. 27; p. 213, fol. 204.]

That on December 30, 1939, appellant, wearing the Gruen wristwatch, and his co-defendant, Elizabeth Williams, wearing her wedding ring and the imitation $1.95 ring, drove from Los Angeles to Calexico, California, where they spent the night at a hotel, and the next morning, on December 31, 1939, drove to Yuma, Arizona. On the trip to Arizona, appellant removed the Gruen wristwatch which he was wearing and, while crossing the bridge over the All-American Canal, threw the Gruen wristwatch in the canal. [Tr. p. 77, fol. 29.]

They returned to Calexico and in the evening dined with friends, a Mr. and Mrs. Brown, across the border, in Mexicali, and then returned to the hotel. [Tr. p. 78, fol. 30.]

Defendant Elizabeth Williams went to bed, and about eleven o'clock was awakened by appellant, and they started walking to the home of Mr. and Mrs. Brown. About two blocks from the hotel, they stopped and decided that they would rush up to Mr. and Mrs. Brown's and tell them they had been held up. [Tr. p. 81, fol. 32.] They threw the imitation diamond ring away [Tr. p. 109, fol. 59] and rushed up to the Browns', door, and appellant said to the Browns, "We have just been held up a tall man and a short man." [Tr. p. 81, fol. 34.]

They thereafter went to the Police Station in Calexico and made the same report. [Tr. p. 80, fol. 33.]

On January 2, 1940, appellant reported to appellee that he and his wife had been held up in Calexico by armed

robbers who had taken all of the insureds' jewelry, in addition to $96.00 cash, with the exception of defendant Elizabeth Williams' wedding ring, and gave the details of an alleged hold-up to the effect that they had been deprived of their property by a tall man and a short man armed with a revolver on December 31, 1939, at Calexico, California. [Tr. p. 181, fol. 159.]

On February 19, 1940, defendants presented sworn statements in proof of their loss as claimed; and on March 9, 1940, appellee paid to appellant and his co-defendant, by drafts payable to both, the amounts claimed in the proofs of loss, to-wit, $4,250.00. [Tr. p. 11, fol. 10.]

The jewels remained where they had been placed between the two boards in the attic room in appellant's home until sometime in the latter part of May or the first of June, 1940 [Tr. p. 99, fol. 46] when appellant told his co-defendant that the jewels had to be broken up, *i.e.*, dismounted from their settings, and it was agreed that they would ask a Mr. Leitch, who owned a dental technician's laboratory in San Diego and who was a friend of defendant Elizabeth Williams' and an acquaintance of appellant's, to break up the jewels for them. [Tr. p. 101, fol. 48.]

Appellant thereupon retrieved the boards containing the jewels from their hiding place in the attic, and the defendants drove to Balboa where appellant had a boat, and on the boat appellant separated the boards and removed the jewels from their hiding place. [Tr. p. 101, fol. 49.]

They then drove to San Diego in a Dodge Coupe with the jewels. Appellant parked his car around the corner from University Avenue, on which street Mr. Leitch's

laboratory was located, and remained seated in the car while his co-defendant took the jewels to the laboratory [Tr. pp. 102-3, fols. 50-51] and there explained to Mr. Leitch that they wished the jewels removed from their settings as they needed money and could get more with the stones out of the settings than in the settings. [Tr. p. 115, fol. 68.] She did not ask Mr. Leitch to break up the diamond wristwatch and the friendship ring because appellant did not want them broken up. [Tr. p. 104, fol. 52.]

Mr. Leitch, using his dental technician's tools, proceeded to remove the jewels from the settings of the bracelet, engagement ring, and the man's ring. [Tr. p. 104, fol. 52.]

During the time that these jewels were being dismounted, there were present several people, to-wit, James Keith, witnesses Hugh Jones, Lolita Jones, and Mr. Lloyd, who observed the jewels and the process of dismounting and one of whom, witness Jones, assisted Mr. Leitch in the operation. [Tr. pp. 132, 138, 147.]

During the process of dismounting the jewels, which consumed several hours as Mr. Leitch was also engaged in other matters, Mr. Leitch asked defendant, Elizabeth Williams, to go to the car and bring appellant to the laboratory. Defendant Elizabeth Williams left the laboratory and returned later, reporting that Mr. Williams declined to come to the laboratory. [Tr. p. 117, fol. 71.]

After the jewels were dismounted, defendant Elizabeth Williams placed the unmounted jewels in a handkerchief and, together with Mr. Leitch, walked to the car, where they found appellant seated. Mr. Leitch, who knew appellant, having met him on several occasions prior to

this, shook hands with appellant, and appellant thanked him for dismounting the stones for defendants. [Tr. pp. 105, 117, fols. 54, 71.]

The defendants then returned to their home in Los Angeles where appellant placed the unmounted stones, together with the ladies' diamond watch and attachment and the friendship ring, in a handkerchief, put them in a document box and hid them in the attic room where the jewels had previously been hidden. [Tr. p. 106, fol. 56.] Shortly thereafter defendant Elizabeth Williams removed the ladies' wrist watch with the diamond attachment, and the friendship ring from this hiding place and hid them in another room in the house. [Tr. p. 239, fol. 238.]

Although defendants had separated sometime in May of 1940, they appeared to be on friendly terms, appellant having a key to their home, sleeping there on occasion, and, in July, financing a trip of his co-defendant to the East, appellant occupying the home during her visit.

During her trip to the East, the jewels apparently remained in the hiding place, as she found them there on her return from her trip; and, sometime in August, 1940, showed the uncut diamonds to a friend, witness Luise Berrenberg, afterwards returning them to their hiding place in the attic.

In August or September, 1940, appellant had moved from the home but still had a key to the outer door of the house. [Tr. p. 326, fol. 221; Tr. p. 227, fol. 222.] He had been demanding the unset jewels from his co-defendant, and one evening in August or September of 1940, defendant Elizabeth Williams attended a Bowl concert with some neighbors. Before leaving the house, she locked the door between the bathroom and the dressing room which gave access to the attic room and to which

appellant did not have a key. [Tr. p. 227, fols. 221, 222.] Upon her return home, she found a panel in the middle of the door leading to the attic room cut out and removed, giving access to the attic, and, upon investigation, found the unset diamonds gone. [Tr. p. 227, fol. 222.] The watch and the friendship ring were not taken, and she did not report the matter to the police for the reason that the unset diamonds were the only things taken.

Appellee's Answer to Appellant's Specification of Errors No. 1.

Although appellant's Specification of Errors No. 1 is insufficiency of the evidence to justify the findings, conclusions, and judgment, he does not point out any particular finding of which he complains; but since all of the Court's findings, with the exception of Findings 9 and 10, were alleged in the Complaint and admitted in the Answer, we must assume that the exceptions go to these two findings. [Tr. pp. 20-22, fols. 25-27.]

In these findings, the Court found that no robbery or loss had occurred at Calexico, or at any other place at all, and that defendants made the false representations that such a loss had occurred for the purpose of deceiving and defrauding the appellee, and did deceive and defraud the appellee and induce the payment by appellee to defendants of the sum of $4250.00, and drew the obvious conclusions therefrom that appellee should have judgment in this amount.

Appellant's argument on this assignment is so confused and inconsistent that it is difficult to find a logical starting place for an argument against it. In effect, appellant has set up a straw man for this court and the appellee to knock down. He commences his argument by the gratui-

tous statement that the case, being predicated on a conspiracy, the judgment cannot be based on the uncorroborated admissions of one of the alleged conspirators, and then proceeds to argue that the case was pleaded and tried on the theory of conspiracy. However, he commences his argument (App. Brief p. 5) with the statement that the vital question in the case is, did a holdup occur? And that if it did not occur, the judgment of the court was obviously correct; in other words, if the District Court's findings 9 and 10 are supported by the evidence, the judgment is correct.

Appellant certainly cannot be unmindful of the rule that the Appellate Court will not resolve conflicting evidence or pass upon the credibility of witnesses, or that findings of fact will not be set aside unless clearly erroneous, and he has pointed out no place wherein the findings are not supported by the evidence.

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."
>
> *Rule 52(a), Federal Rules of Civil Procedure.*

This, of course, is the rule in this circuit.

Maryland Casualty Co. v. Stark, 109 Fed. Rep. (2d) 212 (9th Cir.);

Cherry-Burrell Co. v. Thatcher, 107 Fed. (2d) 65 (9th Cir.);

Lumbermen's Mut. Casualty Co. v. McIver, 110 Fed. (2d) 323 (9th Cir.);

Occidental Life Ins. Co. v. Thomas, 107 Fed. (2d) 876 (9th Cir.).

In the last case cited, the Court said:

> "Questions as to the weight of the evidence are not to be decided by us."

With this rule in mind, it would appear that nothing more than the foregoing statement of the evidence adduced at the trial would be necessary to demonstrate the absolute correctness of the District Court's findings 9 and 10.

While the chief witness for appellee was appellant's co-defendant, who was called to the stand under the provisions of Rule 43(b) of Civil Procedure, the District Court believed her testimony over the impeached testimony of appellant; and the testimony of this witness was substantially corroborated by a great number of other witnesses and by admissions of appellant himself.

There was produced by defendant Elizabeth Williams' attorney, and introduced in evidence by appellee, a platinum diamond watch with a diamond bracelet attachment [Plaintiff's Exhibit 7—Tr. p. 111, fol. 63], and one diamond friendship ring [Plaintiff's Exhibit 8—Tr. p. 111, fol. 63]. Both defendants admitted that, with the exception of an Elk's pin, defendant Elizabeth Williams' cigarette case, and a small approximately one-carat man's diamond ring, they had no other jewelry than the jewelry appellant claims was taken from them by the robbers, although appellant claimed that Plaintiff's Exhibit 7 was not the watch which they owned, and that Elizabeth Williams had this in addition to the watch which he claimed was taken by the robbers. [Tr. p. 72, fol. 26; Tr. 164, fol. 137.] But, notwithstanding this, the defendants appeared in San Diego within a few months after they had received the insurance money and there, in the

presence of four unimpeached witnesses, had the elaborate bracelet and the two large diamond rings dismounted. One of these disinterested witnesses, Arthur Leitch, positively identified appellant as chivalrously sitting in the car while his wife had the jewels removed from their settings, and then thanking him, Leitch, for doing the job for them.

Defendant, Elizabeth Williams, positively identified Plaintiff's Exhibits 7 and 8 as the watch and friendship ring insured and for which the defendants made claim against appellee.

Witness Irma Cudd, a disinterested witness and unimpeached and familiar with the articles, identified Exhibits 7 and 8 as the watch and ring which Elizabeth Williams wore; and appellant himself testified that at all times after defendants were married, the insured wrist watch was the only wrist watch which she wore. [Tr. p. 178, fol. 54.]

Although the parties had no other jewels than the ones claimed to have been stolen, some time after the San Diego episode defendant Elizabeth Williams showed to witness Luise Berrenberg a number of loose unset diamonds. [Tr. p. 107, fol. 57; Tr. p. 313, fol. 339.]

Even though on an appeal of this kind it would be necessary to establish a weight of evidence, the above two incidents show an ample corroboration and weight, particularly as against the appellant's unsupported and impeached denials.

The District Court, having the advantage of observing the witnesses on the stand, their candor or lack of candor, their manner of testifying, and the many side-plays that do not appear in a record, chose to believe appellee's witnesses and to disbelieve the testimony of appellant. Ap-

pellant's lack of candor on the stand and his impeachment by testimony of other witnesses appear throughout the record, but this brief need not be burdened with more than a reference to a few of these instances.

Appellant denied positively that defendants had gone to Yuma on their trip to Calexico and denied that he had ever made a statement to that effect to appellee's adjuster, Robert Reynolds. [Tr. p. 202, fol. 189; Tr. p. 203, fol. 191.] Robert Reynolds, called as witness by appellee, testified positively that he did make such a statement, and his testimony was supported by a written memorandum made by said witness at the time. [Tr. p. 234, fol. 364; Defendants' Ex. AA, Tr. p. 339.] He denied going to San Diego and was impeached by the testimony of witness Arthur Leitch. He denied that he had ever seen the witness Berrenberg until she walked into the court room, but when vigorously cross-examined by the trial judge, he recanted. [Tr. p. 345, fol. 370; Tr. p. 346, fol. 371.] He said that the diamond and emerald bracelet cost over $800.00 and that he paid for it in two checks [Tr. p. 157, fol. 128], but the witness Lippett, from whom he purchased the bracelet, testified that he paid for it in one check in the amount of $355.00, and the cancelled check was introduced in evidence as Plaintiff's Exhibit 13. [Tr. p. 261, fol. 266; Tr. p. 263, fol. 268.] Many other instances of his lack of candor on the stand appear throughout the record; for instance, his inability to remember that he had purchased his wife a diamond wrist band for the watch, in his effort to deny the identity of Plaintiff's Exhibit 7 [Tr. p. 160, fol. 132], although he could remember with the most perfect detail the acquiring of every other item involved; his testimony with reference to the John Marcin ring. [Tr. p. 163, fol. 136; Tr. p. 272, fol. 285.] But we believe we have

pointed out sufficient instances of appellant's unreliability to demonstrate that the trial court was fully justified in disbelieving his story of the alleged robbery and adopting the appellee's version.

(a) Answer to Appellant's Argument That the Case Was Tried on the Theory of Conspiracy.

In view of the overwhelming evidence supporting the court's findings that appellant was liable for his own tortious acts and not for the acts of his co-defendant, we would not burden this brief with an answer to this argument, except for our belief that all points raised, however absurd, should be discussed.

This is an action in fraud wherein judgment was had against appellant for his own tortious acts. The gravamen of the action is not the conspiracy but the fraud perpetrated by appellant.

Appellant's co-defendant was a joint tort-feasor with appellant in perpetrating the wrong, and judgment from which she has not appealed, was had against her also.

> "It is a general and well-settled principle of law that, where two or more persons are sued for a civil wrong, it is the civil wrong resulting in damage, and not the conspiracy, which constitute the cause of action. (*Herron v. Hughes,* 25 Cal. 555; *Davitt v. Bakers' Union*, 124 Cal. 99 (56 Pac. 775); *Dowdell v. Carpy,* 129 Cal. 168 (61 Pac. 948); *Menner v. Slater*, 148 Cal. 284 (83 Pac. 35).) In such an action, the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tort-feasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity. (*Cohen v. Fisher,* 135

App. Div. 238 (120 N. Y. Supp. 546); *White v. White*, 132 Wis. 121 (111 N. W. 1116); *Miller v. John*, 208 Ill. 173 (70 N. E. 27).) A plaintiff is entitled to a joint recovery of damages against such defendants as he can show have united or cooperated in inflicting a wrong upon him."

Revert v. Hesse, 184 Cal. 295.

See also:

McPhetridge v. Smith, 101 Cal. App. 122;

Bowman v. Wohlke, 166 Cal. 121;

Mox Incorporated v. Woods, 202 Cal. 674;

Tuman v. Brown, 59 Cal. App. (2d) 16;

5 *Cal. Jur.* 530;

15 *C. J. Secun.* 1040.

(b) Answer to Appellant's Argument That the Uncorroborated Story of a Co-Conspirator Is Insufficient to Justify a Judgment Against the Co-Conspirator.

In view of the complete corroboration of the testimony of appellant's co-defendant, the above postulate, if true, would fall of its own weight, and we are again answering this argument only for the purpose of meeting all points raised in appellant's brief.

Appellant, on pages 12 and 13 of his brief, cites three California cases to the effect that *declarations* of a conspirator cannot be received against his co-conspirator before independent proof of the conspiracy has been adduced.

With these cases we have no quarrel but it must be noted that these cases all refer to *extra-judicial* statements and have no reference to testimony given under oath at a

trial. Although there is no assignment of error on the reception of any evidence of this sort, it will be noted that the trial court, in every instance where it appeared that extra-judicial statements of the co-defendant were given or about to be given, confined their admissibility to the co-defendant only.

Under this heading, on page 15 of his brief, appellant makes the statement that it is the rule in California, as well as in the federal courts, that proof of a conspiracy cannot rest solely upon the testimony of a co-conspirator at the trial. This is not the law.

Both under the California law and the rule in this circuit, a co-conspirator is a competent witness against another conspirator.

Rosenbaum v. Hernberg, 17 Cal. 602;

Wong Din v. United States, 135 Fed. 702 (9th Cir.).

And the direct evidence of one witness who is entitled to full credit is sufficient to prove any fact except perjury and treason.

C. C. P. 1844.

And in the Federal Court, even in criminal cases, a person may be convicted on the uncorroborated testimony of an accomplice if the finder of facts find the testimony true and sufficient.

See the *Caminetti* case, 242 U. S. 470, 37 S. Ct. 192, 61 L. Ed. 442;

Henderson v. United States, 20 Fed. (2d) 90.

We cannot pass this phase of the case without commenting upon the absolute unfairness of appellant's argu-

ment on this phase. On pages 16 and 17 of appellant's brief, appellant attempts to show that his co-defendant had testified under oath contrary to the testimony given at this trial and quoted a portion of the testimony of this witness endeavoring to establish that contrary testimony had been given regarding the robbery at the divorce trial. Counsel does not advise the court that both of the reporters who reported the divorce case appeared, and at that time appellant stipulated that the reporters' notes do not show that Mrs. Williams ever made a statement to the effect that she had lost any jewelry in a robbery. [Tr. p. 269, fol. 276; Tr. p. 289, fol. 307.]

It is evident that defendant Elizabeth Williams participated in the fraud and joined in the false statements to plaintiff by which it was defrauded, but it is equally evident that when she decided to disclose the whole matter and tell the truth, that her statements thereafter were all consistent and her testimony on the trial was completely worthy of belief and was believed by the trial court.

Answer to Appellant's Specification of Error No. 2.

Under this specification of error, appellant makes the astounding contention that the court's judgment is erroneous in that it failed to credit appellant with the value of the platinum diamond watch and bracelet attachment (Plaintiff's Exhibit 7) and the diamond friendship ring (Plaintiff's Exhibit 8) which are now in the custody of the court as exhibits. Just what can be said in answer to such a contention! The matter was nowhere placed in issue. [Tr. p. 364, fol. 395; Tr. p. 11, fol. 10.] The testimony shows that the items were the separate property of defendant Elizabeth Williams who has not appealed. [Tr. p. 61, fol. 8; Tr. p. 60, fol. 7; Tr. p. 162, fol. 135.] Appellant denies that Exhibit 7 is the watch

that he made claim for, and denies or fails to remember, that he ever purchased a diamond bracelet for this watch. [Tr. 160, fol. 133; Tr. p. 163, fol. 135.] He denies that he had ever seen the ring (Plaintiff's Exhibit 7) before it was introduced into court. [Tr. p. 69, fol. 2.] Appellee does not have the items, did not retrieve them, and did not claim them. They were produced by defendant Elizabeth Williams' attorney and offered in evidence with the stipulation that they belonged to defendant Elizabeth Williams but that appellee would be responsible for them while in evidence. [Tr. p. 111, fol. 63; p. 365, fol. 395.] Appellee does not own the watch, never saw the diamond bracelet, or the friendship ring before they were introduced at the trial, and yet appellant wants credit for them in the judgment. What more can be said?

Answer to Appellant's Specification of Error No. 3.

Appellant under this assignment makes three subparagraphs, *to-wit*:

(a) that the court erred in denying appellant's motion for a new trial;

(b) in denying appellant's motion to amend findings;

(c) in denying appellant's motion to correct findings.

Appellant does not argue the particular specifications, but for further sake of the record, we will briefly mention them.

Aside from his complaint of the insufficiency of the evidence, appellant in his motion to amend complained because the trial court did not make specific findings of the value of the jewels alleged to have been lost. The court found that the jewels were not lost or stolen and it therefore became immaterial what the exact value was so long as appellant had represented a value and received the sum represented from appellee.

The trial court is not required to make findings on all the facts presented but to find only such ultimate facts as are necessary to reach a decision in the case.

> "The trial court is not required to make findings on all the facts presented and need only find such ultimate facts as are necessary to reach the decision in the case."
>
> *Klimkiewicz v. Westminster Deposit & Trust Co.,* 122 Fed. (2d) 957.

Also

> *Tulsa City Lines, Inc. v. Mains,* 107 Fed. (2d) 377.

Under this assignment appellant also charges insufficiency of evidence and newly-discovered evidence. What has heretofore been said we believe sufficient to answer the insufficiency of evidence claimed, and this will not be discussed further.

Under newly-discovered evidence, which appellant argues to some length, he bases his case on affidavits filed in support of the motion for a new trial. Again we are forced to call the court's attention to the fact that he refers only to the affidavits filed on his behalf and does not even mention the contradictory affidavit filed by appellee.

It seems hardly necessary to call the court's attention to the well-settled rule that orders denying a new trial are not reviewable on appeal in the absence of a clear abuse of discretion, which has not been shown here.

> *United States v. Bransen,* 142 Fed. (2d) 232, (9th Cir.)

Or that alleged newly-discovered evidence which would not materially change the result is not ground for a new trial.

Id.

Or that applicant for a new trial is required to rebut the presumption that there has been a lack of diligence.

Id.

Or that the application for a new trial will be denied where it appears that the degree of activity or diligence which led to the discovery of the evidence after the trial would have produced it had it been exercised prior thereto.

Id.

On its face, the affidavit filed by George Penney, attorney for appellant in support of his motion for a new trial, fails to show any diligence whatsoever in attempting to produce the testimony named as newly-discovered evidence. On the contrary, it shows a decided lack of diligence on appellant's part. The plea is that appellant was unable to learn of the necessity of or the existence of the testimony until after the taking of the deposition of his co-defendant. The record shows that the complaint herein was filed on February 4, 1943. [Tr. p. 10.] Said defendant was a resident of Los Angeles and available as a witness in a deposition until about four months before the trial on December 12, 1944. [Tr. p. 58, fol. 5.] The affidavit of H. P. Bledsoe, one of counsel for appellee, shows that after the time of the deposition and before the trial, he succeeded without difficulty in interviewing witnesses whose testimony is referred to in appellant's affidavit in support of his motion for a new trial. [Tr. pp. 39-46.] It is also noted that several of these witnesses

were present at the trial and conferred with the appellant and his attorney, which was not denied by appellant.

In view of the fact that the motion for a new trial is addressed to the sound discretion of the trial judge and that the appellate court will not review a ruling on such a motion in the absence of a clear abuse of discretion and only in the most exceptional circumstances, we believe enough has been said on this point.

In conclusion we respectfully submit that the findings and judgment of the trial court were correct and the judgment should be affirmed on this appeal.

Respectfully submitted,

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